NO. 45996-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CLAUDE HUTCHINSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 12-1-03741-0

SUPPLEMENTAL BRIEF OF RESPONDENT, APPELLATE COSTS

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Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT HUTCHINSON'S MOTION TO MODIFY.

1. Where RAP 14.5 requires a party objecting to a cost bill to file an objection within ten days after service of the cost bill, does failure to file an objection constitute a waiver of any objections a party may have had to the cost bill?

B. INTRODUCTION.

On March 1, 2016, this Court issued its opinion in which it affirmed the defendant's conviction and sentence. The state filed a timely cost bill on March 10, 2016. The defendant did not file an objection to the cost bill and accordingly this Court's commissioner issued a cost bill ruling awarding the state's requested costs on August 8, 2016. Thereafter on September 12, 2016, the defendant filed a motion to modify the award of costs which was accepted despite having been filed five days beyond the RAP 17.7 deadline for such a motion.

The state previously filed a response to the motion to modify on October 11, 2016. The state now submits this supplemental response per the Court's December 28, 2016, order.

C. ARGUMENT.

1. THE DEFENDANT'S MOTION TO MODIFY SHOULD BE DENIED WHERE THE DEFENDANT WAIVED ANY OBJECTION, AND WHERE IN ANY EVENT THE AWARD CONSTITUTES AN APPROPRIATE EXERCISE OF THE COURT'S DISCRETION.

RCW 10.73.160(2) states that "the court of appeals...may require an adult offender convicted of an offense to pay appellate costs." This provision provides appellate courts with legislative authorization to order the recoupment of some or all of the costs of an appeal from a defendant who does not prevail. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). In ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016), Division I stated that the award of appellate costs to a prevailing party is within the discretion of the appellate court.

The procedure by which an award of costs is made is governed by the appellate rules. ***State v. Nolan***, 141 Wn.2d 620, 625, 8 P.3d 300 (2000) ("RCW 10.73.160(1) requires us to apply its provisions in a fashion consistent with Title 14 of the Rules of Appellate Procedure."). RAP 14.5 provides that a party may object to a "cost bill within 10 days after service of the cost bill upon the party." RAP 14.6(a) further provides that a commissioner "will determine costs within 10 days after the time has expired for filing objections to the cost bill." This Court has held that

failure to file an objection within the ten day time limit constitutes a waiver of any potential objections. ***State v. Maples***, 171 Wn. App. 44, 51, 286 P.3d 386 (2012) ("Maples waived any objections he had by not exercising his right to object within 10 days or by seeking timely appellate review.").

Under the plain terms of RAP 14.5 and 14.6(a) as interpreted by ***Maples***, defendant Hutchinson implicitly waived any objections he may have had by not filing a timely objection to the state's timely cost bill. For this reason, the Court should deny the defendant's motion because the objections that the defendant voiced in his modification motion were waived.

There are further reasons for denying the motion having more to do with how the appellate costs statute has been previously interpreted. In recent cases ability to pay has taken on greater significance than it had in the past. In the ***Sinclair*** case the court reviewed the appellate costs statute in light of ***Blazina***. ***State v. Sinclair***, 192 Wn. App. 380, 389, 367 P.2d 612 (2016). *See* ***State v. Blazina***, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). In light of that review, the court in ***Sinclair*** held that, "Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it

necessarily an indispensable factor." ***State v. Sinclair***, 192 Wn. App. at 389.

Subsequent to ***Sinclair*** this Court has relied almost entirely on ability to pay in declining to award appellate costs saying, "With [the defendant's] presumed continued indigency, the imposition of appellate costs would threaten" evils discussed in ***Blazina***, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." ***State v. Grant***, ___ Wn. App. ___, 385 P.3d 184, 187 (2016), quoting ***State v. Sinclair***, 192 Wn. App. at 391, and ***State v. Blazina***, 182 Wn.2d at 835. *See also* ***State v. Burch***, ___ Wn. App. ___, ___P.3d___, 2016 WL 7449398 (Dec. 28, 2016) ("Therefore, following our recent decision in ***State v. Grant***. . . we exercise our discretion and decline to impose appellate costs on Burch.")

Ability to pay while admittedly a factor was not always the only, nor the deciding factor prior to ***Blazina***. In light of the uncertainties inherent in determining a defendant's ability to pay by an appellate court during a direct appeal, it was once thought that it would be more than reasonable for an appellate court to defer consideration of ability to pay. ***State v. Blank***, 131 Wn.2d 230, 242, 930 P.2d 1213, 1220 (1997). In ***Blank*** the court reasonably observed, "Moreover, common sense dictates that a determination of ability to pay and an inquiry into defendant's

finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer." *Id.* This sentiment reflects the logic of the appellate costs statute which expressly protects the indigent by providing, "If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment . . . ." RCW 10.73.160(4).

The idea that those convicted of a crime should be required to pay some of the expense is not new. In 1976, the legislature enacted RCW 10.01.160 concerning trial court costs. A short time afterward in ***State v. Barklind***, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that costs which included contribution for appointed counsel under this statute did not "impermissibly burden defendant's constitutional right to counsel." *Id.* at 818.

Imposition of appellate costs is also not new. The statute was enacted in 1995 in response to ***State v. Rogers***, 127 Wn.2d 270, 281, 898 P.2d 294 (1995), which held that appellate costs could not be awarded in the absence of statutory authority. *See* Laws of 1995, Ch. 275 § 3, and ***State v. Nolan***, 141 Wn.2d 620, 625, 8 P.3d 300 (2000). ***Nolan*** examined

RCW 10.73.160 and noted that it was enacted in order to allow the courts to require one whose conviction and sentence is affirmed on appeal to pay appellate costs including statutory attorney fees. *Id.* at 627. In ***Blank***, supra, at 239, the Supreme Court held the statute constitutional and affirmed this Court's award of appellate costs as "reasonable." *See* ***State v. Blank***, 80 Wn. App. 638, 643, 910 P.2d 545 (1996).

Upon issuance of a commissioner's ruling on costs a party may object by filing a motion to modify the ruling. RAP 14.6(b) provides that a party filing a motion to modify the ruling must do so "in the same manner and within the same time as provided for objections to any other rulings of a commissioner or clerk as provided in rule 17.7." RAP 17.7 in turn provides that a motion to modify "must be served on all persons entitled to notice of the original motion and filed in the appellate court not later than 30 days after the ruling is filed." Where a timely motion to modify is not filed "within the time permitted by RAP 17.7, the ruling becomes a final decision of this court." ***Detention of Broer v. State***, 93 Wn. App. 852, 857, 957 P.2d 281 (1998) citing ***Kramer v. J.I. Case Mfg. Co.***, 62 Wn. App. 544, 547, 815 P.2d 798 (1991) and ***Gould v. Mutual Life Ins. Co.***, 37 Wn. App. 756, 758, 683 P.2d 207 (1984).

In this case the state filed and served its cost bill on March 10, 2016. The defendant did not object within 10 days and thus under ***Maples***

should be considered to have waived "any objections he had by not exercising his right to object within 10 days." ***State v. Maples***, 171 Wn. App. at 51. Thereafter the Commissioner issued the Court's ruling on the cost bill on August 8, 2016. That ruling became the "final decision of this court" 30 days later on September 7, 2016. ***Detention of Broer v. State***, 93 Wn. App. at 857.

Except for the defendant's motion to extend time, nonexistence of the defendant objection to the state's cost bill together with the untimeliness of his motion to modify would lead to denial of his motion. However the motion to extend time was granted under RAP 18.8(a). RAP 18.8 does not on its face preclude the Court from extending time in order to accept an untimely motion to modify. That having been said, since a commissioner's cost ruling "becomes a final decision of this court" under ***Broer***, it would be reasonable to consider such a motion as analogous to a motion for reconsideration. In that light, under RAP 18.8(b), "The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time . . . ." Thus RAP 18.8 could provide an additional reason not to grant the defendant's motion.

Prior to the time of collection, the determination of whether the defendant either has or will have the ability to pay is necessarily

speculative. ***State v. Baldwin***, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991); ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). It has been suggested that the proper time for determining if a defendant is indigent "is the point of collection and when sanctions are sought for nonpayment" as to appellate costs. ***Blank***, 131 Wn.2d at 241–242, ***State v. Wright***, 97 Wn. App. 382, 383-84, 965 P.2d 411 (1999). As noted in ***Blank*** "there is no reason [at the time of the decision] to deny the State's cost request based upon speculation about future circumstances." *Id.* at 253.

It is important to acknowledge that in ***Blazina***, the Supreme Court rejected the argument that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." ***State v. Blazina***, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (footnote one), ***State v. Shirts***, 195 Wn. App. 849, 854-55, 381 P.3d 1223 (2016). However, the statute at issue in ***Blazina*** and ***Shirts*** specifically prohibited trial courts from ordering a "defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). That prohibition is not included in the appellate costs provision. *See* RCW 10.73.160.

Finally, most criminal defendants are represented on appeal at public expense. In this case, as is likely in most cases, one of the most expensive part of a state's cost bill is attorney fees. RCW 10.73.160(3)

specifically allows for "recoupment of fees for court-appointed counsel." Since defendants with "court-appointed counsel" are necessarily indigent, the statutory provision for attorney fees would be meaningless if such fees were invariably denied on the basis of ability to pay. By enacting RCW 10.01.160 and RCW 10.73.160, the legislature expressed its intent that criminal defendants, including the indigent, should contribute to the cost of their cases.

RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 was enacted in 1995. These legislative determinations should be given full effect. An award of costs should reflect to some extent the cost to the public of an appeal. In this case the two most significant costs are the cost of replication of the verbatim reports and the attorney fees for the defendant's appointed attorney. It is submitted that a rational basis on which this court may exercise its discretion is the economic value to the defendant of the resources expended on his behalf. As to the verbatim reports, clerk's papers and the like, the economic value should be the same as the actual cost of those items. After all the cost of those items is the same no matter who the particular litigant before the Court might be. As to attorney fees, Courts determine the reasonableness of attorney fees in a wide variety of contexts and the same should be done here in the event the Court's discretion leads it to award less than the actual amount requested.

As to ability to pay, this Court can award appellate costs, including attorney fees, on the basis of the actual cost of this appeal or even with a discount, secure in the knowledge that ability to pay must be taken into account "before enforced collection or any sanction is imposed for nonpayment. . . ." ***State v. Blank***, 131 Wn.2d at 242.

D. CONCLUSION.

For the foregoing reasons the state respectfully requests that the Court deny the defendant's motion to modify the commissioner's award of appellate costs.

DATED: Tuesday, January 10, 2017.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/10/17 Schneider
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PIERCE COUNTY PROSECUTOR

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